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**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO. 76D-) FINAL ORDER
30025038 BY MARL LAKE INC.)**

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on June 29, 2007, in Whitefish, Montana, to determine whether a beneficial water use permit should be issued to Marl Lake, Inc., hereinafter referred to as "Applicant" for the above application under the criteria set forth in Mont. Code Ann. §85-2-311.

APPEARANCES

Applicant appeared at the hearing by and through, Edna Gwynn, Secretary, and Bill Gwynn, President, Marl Lake, Inc.

Objectors Keith and Lenore Burgess appeared at the hearing and testified in their own behalf. Objector Cheryl Timlick appeared at the hearing for Objector Cheryl and Benny Timlick, and testified in her own behalf.

EXHIBITS

Objector Timlick offered two exhibits for the record. The exhibits are admitted into the record to the extent noted below. The Hearing Examiner did not rule on the admittance of Exhibit OCT2 at the hearing, however, there being no objections voiced when it was offered, it is hereby considered a part of the record in this matter. Objector Timlick's Exhibit Nos. OCT1 and OCT2 are admitted into evidence.

Objector Timlick's Exhibit OCT1 consists of 28 photographs showing Deep Lake, Deep Lake inflow and water measuring site, a diversion dam upstream of Deep Lake (washed out), and other photos generally in the area of Deep Lake, all taken on various dates.

Objector Timlick's Exhibit OCT 2 is a copy of a four-page memorandum To the Keith Johnson file No. 24223 by James H. Rehbein dated April 7, 1983 regarding Application No. 24223-s76D.

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2 **PRELIMINARY MATTERS**

3 Immediately prior to the hearing, Edna Gwynn clarified for the Hearing Examiner that the
4 Applicant in this matter is Marl Lake, Inc., and the corporation wishes to proceed without
5 counsel with the information contained in the Department file. The Hearing Examiner informed
6 the Gwynns that because they lacked legal counsel to represent the corporation they would not
7 be able to make opening or closing statements, offer testimony, call witnesses, object to
8 Objector testimony, or cross-examine the Objectors. See Mont. Code Ann. §37-61-201. The
9 Gwynns and the Objectors were informed that the Objectors may cross-examine the Gwynns if
10 they had questions. Objectors had no questions for the Gwynns. Objectors each then presented
11 themselves in their case. The Hearing Examiner allowed Mr. Gwynn to make a short statement
12 after Objectors had presented their cases.

13 The Hearing Examiner, having reviewed the record in this matter and being fully advised
14 in the premises, does hereby make the following:

15

16 **FINDINGS OF FACT**

17 **General**

18 1. Application for Beneficial Water Use Permit 76D 30025038 in the name of Marl Lake,
19 Inc., and signed by Edna Gwynn, Secretary, was filed with the Department on November 1,
20 2006. (Department file)

21 2. A public notice describing facts pertinent to this application was published in the
22 *Tobacco Valley News*, a newspaper of general circulation on February 22, 2007, and was
23 mailed to persons listed in the Department file on February 16, 2007. (Department file)

24 3. The Environmental Assessment (EA) prepared by the Department for this application
25 was reviewed and is included in the record of this proceeding. (Department file)

26 4. At hearing Edna Gwynn clarified for the Hearing Examiner that they applied for the
27 Department lawn and garden standard volume of 2.5 acre-feet per acre, or 5 acre-feet. Admin.
28 R.M. 36.12.115(2)(b). However, they will only use the volume computed using the flow rate and
29 time of use, and not the Department standard. The Application contains an annual lawn and
30 garden volume computation of 1.77 acre-feet using a 120 day pumping period of diversion and
31 the 20 gallon per minute (gpm) flow rate. Applicant plans to irrigate with 4 sprinklers at a rate of

5 gpm, for two 120 minute-sets per day. In her clarification Edna Gwynn amended the period of diversion and period of use for both uses to June 1 through August 31, inclusive of each year. The modified application is a subset of the initial application that was described in the public notice. (Department file, hearing statement of Edna Gwynn)

5. Based on the amended period of use (from 120 days to 92 days), the Hearing Examiner used Applicant's formula to re-compute the lawn and volume for the 92 day period. The lawn and garden volume for 92 days of pumping time is 1.36 acre-feet¹. The domestic volume for 92 days of use would be 0.25 acre-feet². The total amount requested after amendment becomes 1.61 acre-feet³. (Department file, hearing statement of Edna Gwynn)

6. Applicant seeks to appropriate a maximum of 20 gallons per minute (gpm) for all uses up to 1.61 acre-feet of water per year from Marl Lake. The water is to be diverted by an electric pump located in the NE¹/₄SW¹/₄NW¹/₄, in Section 3, Township 34 North, Range 26 West, Lincoln County, Montana. The proposed use is domestic use for one household, and two acres of lawn and garden. The proposed domestic and lawn and garden place of use is located in the NE¹/₄SW¹/₄NW¹/₄, in Section 3, Township 34 North, Range 26 West, Lincoln County, Montana. The proposed period of diversion and period of use (as amended at hearing) is June 1 through August 31, inclusive, of each year. (Department file, Finding of Fact Nos. 4, 5 above)

Physical Availability

7. Applicant calculated mean monthly flows using the Basin Characteristics method to determine the physical availability of water at the proposed point of diversion in Marl Lake, and calculated the volume of water in Marl Lake. The minimum flow during the year of Marl Creek above Marl Lake is 67 gpm. The average volume of water per year available to recharge Marl Lake is 982 acre-feet. The volume of Marl Lake is 5110 acre-feet. The total volume of water physically available in Marl Lake on an average yearly basis is 982 acre-feet from recharge, and 5110 acre-feet from storage for a total of 6092 acre-feet. (Department file)

¹ 4 sprinklers * 5 gpm per sprinkler* 2 sets per day * 120 minutes per set * 92 days divided by 325851 gal/acre-foot ≈ 1.36 acre-feet (Application Criteria Addendum formula in Item 4).

² (92 days divided by 365 days per year) times (1 acre-foot divided by 325851 gal / acre-foot) ≈ 82,133 gallons / year or ≈ 0.25 acre-foot / year.

³ 1.36 acre-feet + 0.25 acre-feet = 1.61 acre-feet.

1 **Legal Availability**

2 8. Applicant has provided an analysis of the evidence on physical water availability and the
3 existing legal demands, including but not limited to a comparison of the physical water supply at
4 the proposed points of diversion with the existing legal demands on the supply of water at Marl
5 Lake. Applicant estimated the legal demands of Marl Creek and Marl Lake to be 150.3 acre-feet
6 per year. Adding the water requested under this Application (as originally noticed) brings the
7 demand up to 152.66 acre-feet. The water physically available is 6092 acre-feet, which leaves a
8 balance of over 5939 acre-feet per year. (Department file)

9 9. When there is sufficient water in Marl Lake Objector Burgess can use his sprinkler
10 irrigation pump which requires in excess of 700 gpm. Objector Burgess stores water in Marl
11 Lake. He then releases Marl Lake water which flows into and is combined with the downstream
12 Meadow Creek water for his downstream irrigation. Objector Burgess has been able to irrigate
13 using his sprinkler irrigation system for 3 out of the past 10 years and his flood system in most
14 years. When flood irrigating, Objector Burgess uses all water available up to the extent of his
15 water rights. Two out of the last 10 years Objector Burgess has not been able to irrigate with
16 Marl Lake water. (Department file, testimony of Keith Burgess)

17 10. Objector Burgess did not present evidence that explains why the Applicant's Marl Creek
18 hydrograph which estimates the mean monthly flow of water physically available at Marl Lake
19 exceeds the legal demand of water rights filed in and above Marl Lake. The hydrograph shows
20 water is physically available in excess of legal demands at all times of the year. In response to
21 direct questioning by the Hearing Examiner, Objector Burgess responded that Applicant's
22 requested 20 gpm when added to other illegal uses upstream and dry years causes problems.
23 The amount of water physically available exceeds the existing legal demands within the area of
24 potential impact by 5939 acre-feet per year. Water in the requested amount for the period of
25 diversion is legally available. (Department file, testimony of Keith Burgess)

26 **Adverse Effect**

27 11. Applicant is requesting less than 0.1% of the remaining unappropriated available water.
28 Applicant's plan for the exercise of the proposed permit that demonstrates that the Applicant's
29 use of the water will be controlled so the water right of a prior appropriator will be satisfied is to
30 shut off the electric pump if call from a downstream senior appropriator, including Objector
31 Burgess, is received. (Department file, hearing statement of Edna Gwynn)

12. Objector Timlick's appropriation is from Deep Lake which is immediately upstream of Marl Lake. Objector Timlick's main concern is not with the downstream request of the Applicant, but with upstream appropriations which do not have permits. Objector Timlick will not be affected unless Applicant modifies the outlet (beaver dam) on Deep Lake (immediately upstream of Marl Lake). The beaver dam on Deep Lake is on Applicant's property. Objector Timlick uses Deep Lake to water thirty head of cow-calf pairs, and when Deep Lake is low cattle have a difficult time getting to the water to drink. There is nothing in the Department file indicating that the Applicant intends to modify the outlet of Deep Lake as a part of this project. (Department file, testimony of Cheryl Timlick)

Adequacy of Appropriation Works

13. Applicant intends to divert water with a one horsepower Goulds® submersible pump at the site with a possible lift of 60 feet from the lake surface to the highest point on the property at the site. The pump will distribute water through approximately 500 feet of 2 inch line. The line will be moved across the 2 acres of lawn and garden with a hand line and four Rainbird® sprinklers. The pump discharge at the highest point in the system is 20 gpm. Individual household domestic water use will also be delivered to the single family residence on the parcel through a ¾ inch line from the same pump and pipeline system. The system will be an on demand system at the site and will be turned on and off as the water is used and will not be run on a continuous basis. (Department file)

Beneficial Use

14. Applicant has provided persuasive evidence that the proposed use is a beneficial use of water. The domestic water volume of one acre-foot is based upon the Department standard for a year round domestic use. At hearing, Edna Gwynn stated that the period of use would be less than what was requested in the Application (amended to June 1 through August 31, or 92 days). The actual amount used will be a proportional amount ($\frac{92}{365}$) of the 1 acre-foot, and one acre-foot is not unreasonable for a single domestic use. (Department file)

15. Applicant modified the volume of lawn and garden water to 1.36 acre-feet which is less than the Department standard of 2.5 acre-feet per acre of lawn and garden use (5 acre-feet for 2 acres). Even though less than the Department standard, this amount is sufficient for this place of use. (Department file, hearing statement of Edna Gwynn)

1 **Possessory Interest**

2 16. Applicant has the possessory interest, or the written consent of the owner of the
3 proposed place of use. The proposed place of use is described by Geocode 646120310104000,
4 and Lincoln County Assessor Code 0000012018. Applicant has possessory interest in the
5 proposed place of use. (Department file)

6 **Water Quality Issues**

7 17. No valid water quality objections were filed to this Application. (Department file)

8 Based on the foregoing Findings of Fact and the record in this matter, the Hearing
9 Examiner makes the following:
10

11 **CONCLUSIONS OF LAW**

12 1. The Department has jurisdiction to issue a provisional permit for the beneficial use of
13 water if the applicant proves the criteria in Mont. Code Ann. §85-2-311 by a preponderance of
14 the evidence. Mont. Code Ann. §85-2-311(1).

15 2. A permit shall be issued if there is water physically available at the proposed point of
16 diversion in the amount that the applicant seeks to appropriate; water can reasonably be
17 considered legally available during the period in which the applicant seeks to appropriate, and in
18 the amount requested, based on an **analysis** of the evidence on physical water availability and
19 the existing legal demands, including but not limited to a comparison of the physical water
20 supply at the proposed point of diversion with the existing legal demands on the supply of water;
21 the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a
22 state reservation will not be adversely affected based on a consideration of an applicant's **plan**
23 for the exercise of the permit that demonstrates that the applicant's use of the water will be
24 controlled so the water right of a prior appropriator will be satisfied; the proposed means of
25 diversion, construction, and operation of the appropriation works are adequate; the proposed
26 use of water is a beneficial use; the applicant has a possessory interest, or the written consent
27 of the person with the possessory interest, in the property where the water is to be put to
28 beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not
29 be adversely affected, the proposed use will be substantially in accordance with the
30 classification of water, and the ability of a discharge permit holder to satisfy effluent limitations of
31 a permit will not be adversely affected. Mont. Code Ann. §85-2-311 (1) (a) through (h).

1 3. A public notice containing the facts pertinent to the permit application must be published
2 once in a newspaper of general circulation in the area of the source and mailed to certain
3 individuals and entities. Proper notice has been made. Mont. Code Ann. §85-2-307. See Finding
4 of Fact Nos. 2.

5 Modifications to an application may be considered in a proceeding publicly noticed so
6 long as other appropriators are not prejudiced, regardless of whether the other appropriators are
7 parties to the case. If the proposed modification to the application suggests an increase in the
8 burden on the source beyond that identified in the notification of the application as originally
9 proposed, that could cause prejudice. Lack of complete notice means that persons potentially
10 affected by the change could be given insufficient information to determine the likelihood of
11 whether they would be adversely affected. (See In the Matter of the Application for Beneficial
12 Water Use Permit 76161-s76G by Ed Janney, Proposal for Decision (1992); In the Matter of the
13 Application for Beneficial Water Use Permit No. 24591-g41H by Kenyon-Noble Ready Mix Co.,
14 Proposal for Decision (1981).)

15 Here, the modified application is a subset of the original application. See Findings of
16 Fact No. 4. Therefore, parties to the case are not prejudiced. The modification does not
17 increase the burden on the source beyond that identified in the public notice; therefore, other
18 appropriators are not prejudiced.

19 4. The Applicant has proven that water is physically available at the proposed point of
20 diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont.
21 Code Ann. §85-2-311(1)(a)(i). See Finding of Fact No. 7.

22 5. The Applicant has proven that water can reasonably be considered legally available in
23 the amount and during the period of requested appropriation. Objectors presented little
24 evidence to show water is not legally available. Objector Burgess stated that sufficient water is
25 often not available to meet their demand, but offered little evidence to support the statement or
26 counter Applicant's evidence. Both Objectors believed a part of the irrigation water shortage
27 could be caused by unpermitted or illegal upstream uses, but they acknowledged that this
28 testimony is not relevant in this matter. Legal availability is determined based upon identification
29 of existing legal demands in the Department's records on the source of supply throughout the
30 area of potential impact by the proposed use. Mont. Code Ann. §85-2-311(1)(a)(ii). Legal
31 availability is not determined upon the basis of water uses not lawfully permitted. See In the
32 Matter of Change of Appropriation Water Right No. 114754-43D by Betty J. Thayer, Proposal
33 For Decision (1991), *modified on other grounds* by Final Order (1993)(uses of water without

1 water right not considered). Mont. Code Ann. §85-2-311(1)(a)(ii). See Finding of Fact Nos. 8, 9,
2 10.

3 6. The Applicant has proven that the water rights of prior appropriators under existing water
4 rights, certificates, permits, or state reservations will not be adversely affected. Applicant's plan
5 to assure the water rights of prior appropriators will not be adversely affected is to have a pump
6 which can be shut off if a legitimate call is received. See In the Matter of Beneficial Water Use
7 Permit Application No. 60194-76LJ by Leonard and Leroy Cobler, Proposal For Decision (1988)
8 adopted by Final Order(call is not adverse effect *per se*). Mont. Admin. R. 36.12.120. Mont.
9 Code Ann. §85-2-311(1)(b). See Finding of Fact Nos. 11, 12.

10 7. The Applicant has proven that the proposed means of diversion, construction, and
11 operation of the appropriation works are adequate. Mont. Code Ann. §85-2-311(1)(c). See
12 Finding of Fact No. 13.

13 8. The Applicant has proven the proposed use of water is a beneficial use of water for
14 which Applicant can establish a water right under a permit. The flow rate and volume of water
15 requested is the amount of water necessary to sustain the proposed beneficial use. Mont. Code
16 Ann. §85-2-311(1)(d). See Finding of Fact Nos. 14, 15.

17 9. The Applicant has proven a possessory interest in the property where water is to be put
18 to beneficial use. Mont. Code Ann. §85-2-311(1)(e). See Finding of Fact No. 16.

19 10. The Applicant has proven that the water quality of a prior appropriator will not be
20 adversely affected. No Objection was raised as to the issue of water quality of a prior
21 appropriator being adversely affected. Mont. Code Ann. §85-2-311(1)(f), (g), (h). See Finding of
22 Fact No. 17.

23 11. The Department may issue a permit subject to terms, conditions, restrictions, and
24 limitations it considers necessary to satisfy the criteria for issuance of a beneficial water use
25 permit. Applicant has met the criteria for issuance of a permit. Mont. Code Ann. §85-2-312. See
26 Conclusions of Law Nos. 4, 5, 6, 7, 8, 9 above.

27 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the
28 Hearing Examiner makes the following:

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This final order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

Dated this 6th day of November 2007.

Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
PO Box 201601
Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Minute Order was served upon all parties listed below on this 6th day of November 2007 by first-class United States mail.

MARL LAKE INC
% EDNA Y. GWYNN
PO BOX 645
EUREKA, MT 59917

BENNY A & CHERYL TIMLICK
628 BIRCH GROVE DR
KALISPELL, MT 59901

KEITH C & LENORE A BURGESS
PO BOX 203
FORTINE, MT 59918

Cc:
KALISPELL REGIONAL OFFICE
109 COOPERATIVE WAY STE 110
KALISPELL MT 59901-2387

/ Original Signed By Jamie Price /

Jamie Price
Hearings Unit, 406-444-6615